Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May state courts allow the use of adjudicators who have a direct, personal, substantial, pecuniary interest in a proceeding affecting a physician's right to practice his profession, despite Federal law and U.S. Supreme Court precedent that hold such financial interest violates physicians' rights to an impartial adjudicator, and is therefore repugnant to the Constitution of the United States, that guarantees due process and fair procedure?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT J. JAFFE, M.D., Petitioner in pro se

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER HEALTH PLAN, INC., Respondents.

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BASIS OF SUPREME COURT JURISDICTION

The Court of Appeals, Second Appellate District, entered its judgment on December 1, 2004, Appendix A-1.

On December 16, 2004, Petitioner timely filed a Petition for Rehearing in the Court of Appeals. On December 21, 2004, the Court of Appeals filed an order denying Petitioner a Rehearing. Appendix A-21.

Petitioner timely filed a Petition for Review before the California Supreme Court on January 10, 2005. The California Supreme Court denied Petitioner's Petition for Review on February 16, 1995. Appendix C-1.

The present petition is timely filed under 28 U.S.C. section 2101(c) and under Rule 13.3 of this court.

This application is proper pursuant to U.S. Supreme Court Rule 10(b), as Petitioner seeks review of state court decisions, that conflict with the decision of another state court of last resort and a decision of a U.S. Court of Appeals.

This application is also proper pursuant to Rule 10(c), as Petitioner seeks review of state court decisions, that conflict with relevant decisions of the U.S. Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

Petitioner brings before this court a federal question regarding the required due process and fair procedure afforded to licensed physicians in peer review hearings as provided under the law. The rights of physicians are elucidated in federal law, as provided in 42 U.S.C. 11112, *et seq.* Such protections comport with numerous Supreme Court decisional precedents, which require a fair hearing with the rudiments of due process whenever individuals face loss of a substantial right. *Mathews v. Eldridge*, 724 U.S. 319 (1976); see also *Goldberg v. Kelly*, *supra*, 397 U.S. 254, 267, 271 [90 S.Ct. 1011, 1020, 1022] (administrative hearings demand rudimentary due process, and an "impartial decision maker is essential.")

When a physician is subject to a hearing regarding his right to practice his profession, court decisions that deny him the rudimentary due process of an *impartial decision maker* are repugnant to the Constitution of the United States, contrary to federal law and U.S. Supreme Court precedent and therefore are proper grounds upon which to seek certiorari review by the United States Supreme Court.

This particular case arises from the decision by associated medical entities, (hereinafter referred to collectively as Kaiser) to terminate Petitioner's medical staff membership and clinical privileges.

Hospitals and other health care entities that adversely affect a physician's membership or clinical privileges must report these actions to the State Board of Medical Examiners, which in turn must report them to the United States Department of Health & Human Services (DHHS). 42 U.S.C. sections 11133, 11133(b), 11134(b). Additionally, hospitals have a duty, pursuant to the Health Care Quality Improvement Act, to request information about a physician from the DHHS before they initially grant the physician

privileges (and every two years thereafter). 42 U.S.C. section 11135. Once information concerning an adverse privilege determination is reported to DHHS, the DHHS is empowered through the Medicare and Medicaid Patient Program Protection Act and the Peer Review Improvement Act, 42 U.S.C. sections 1320(a)-7 et seq., and 42 U.S.C. sections 1320c, et seq., to initiate investigations of physicians and exclude them from the Medicare and/or Medicaid programs.

Therefore, as a result of Kaiser's actions, Petitioner was denied not only his right to practice medicine at Kaiser, but also faced limitations to practice at other medical institutions.

BACKGROUND

Petitioner is a board certified internist. From 1977 to 1994 he was an attending physician with Kaiser Foundation Hospital, (also affiliated with the Kaiser Foundation Health Plan, Inc.) He was a partner with the affiliated Southern California Permanente Medical Group for 17 years.

From April 21, 1995 through September 18, 1997, Kaiser held a "formal hearing" to hear on the matter of Petitioner's loss of privileges to practice medicine at Kaiser. This hearing was held before an Arbitrator who acted as fact finder and decision maker, despite the fact that he had a direct financial interest in the issuance of findings against Petitioner. Kaiser had chosen the Arbitrator and paid the Arbitrator's fee 100 percent. The Arbitrator's full-time profession and business was predominantly the representation of hospitals and hospital medical staffs in disputes with individual staff physicians and the preparation of medical staff bylaws. Appendix A-33 through A-40. On December 15, 1997 the Arbitrator upheld Kaiser's termination of Petitioner's hospital privileges.

On or about March 23, 1998, Petitioner sought reconsideration of this termination before the Kaiser Appellate Review Panel (also referred to as ARP). Petitioner timely exhausted his administrative remedies by raising the issue before the Appellate Review Panel that the Arbitrator was biased because Respondents had chosen him and paid his fee 100 percent. Petitioner stated: "The Arbitrator was and is a practicing attorney who represents hospitals only. He does not represent physicians. In fact, the arbitrator was paid by and employed by Kaiser Foundation Hospital, Panorama City."

The Medical Board of California conducted its own investigation of the Kaiser charges at issue, and *twice* affirmed that Appellant's medical practice had not deviated from the accepted standard of care in the Community. Appendix B-10 and B-11. At no time did the California Medical Board or any other licensing agency take any action against Petitioner's medical license.

Petitioner's Writ of Mandamus in this matter, filed on December 16, 2001, was denied by the superior court on January 10, 2003. Appendix B-1. Appellant's motion for a new trial/vacate judgment was denied on March 24, 2003. Appendix B-8. Appellant appealed before the California Court of Appeal, Second Appellate District. Petitioner argued that Respondents had denied him fair procedure, fair hearings, an impartial adjudicator, and that the findings were not supported by substantial evidence. The appeals court affirmed the superior court's decision. Appendix A-1. Petitioner's Request for California Supreme Court Review filed on January 10, 2005 was denied on February 16, 2005. Appendix C-1.

JURISDICTION

A decision upholding Kaiser's action against Petitioner that was issued by the California Courts has now been affirmed by the action of the court of last resort in this state. This decision is in conflict with the relevant decisions of this court which demand that hearings regarding the fundamental right to earn a living by one's licensed profession include an impartial decisionmaker. See *Mathews, supra*, quoting *Goldberg, supra* ("the hearing must include . . . an impartial decision maker.") This decision is also repugnant to the Fourteenth Amendment to the United States Constitution which guaranties due process and equal protection under the laws for such hearings.

Furthermore, the decision against Petitioner issued by the California Court of Appeals, Second District, is in conflict with decisional law issued by the California Court of Appeals, Sixth District Opinion (review denied by California Supreme Court) and in conflict with U.S. Supreme Court precedent as described above and elucidated below. The Appellate Court Second District's decision upholding the action taken against Petitioner endorses health-entity use of biased adjudicators in hearings that affect an individual physician's right to earn a living by his profession.

Petitioner therefore asks this court to grant his petition for a writ of certiorari in order to reconcile these state actions with applicable federal law and U.S. Supreme Court precedent, and to correct the result that, if undisturbed, will provide medical entities unlimited power to terminate a physician without regard to due process and fair procedure.

ARGUMENT

A. Review Should Be Granted Because the California Courts' Decisions are Repugnant to the U.S. Constitution, and also in Conflict With Federal Law and U.S. Supreme Court Precedent that Require Disqualification of an Adjudicator With a Substantial, Direct and Pecuniary Interest in the Proceeding.

A physician is entitled to due process and fair procedure in hearings regarding the revocation of hospital privileges per constitutional and common law, and per California Business & Professions Code § 809, et seq.

The United States Constitution, Article XIV, Section 1 states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal Health Care Improvement Act, 42 USC 11101 et seq., and California Business & Professions Code § 809, et seq. both require impartial adjudicators and fair procedure in accordance with due process for hearings regarding the revocation of hospital privileges.

Petitioner had argued before the superior court that the fact that Kaiser paid the Arbitrator's fee 100 percent caused a bias that was too high to guaranty fair procedure. Appendix B-12 . Petitioner also argued this issue before the Appellate Court. Appendix A-68 and Appendix A-70. Respondents admitted they paid the Arbitrator's fee in their superior court and Appellate court reply briefs. Respon-

dents' Appellate Reply Brief (page 21, paragraph 2) states: "Respondents appropriately paid the Arbitrator's fee . . ."

The superior court's Opinion incorrectly held that Petitioner must show "actual" bias and financial interest based on the "outcome" of the hearing in order to prevail on a claim of bias arising from financial interest. (Opinion Appendix B-5 and B-6.) This holding is contrary to the Federal Court of Appeal, Fifth Circuit, the California Appellate Court, Sixth District, and the precedent of the Unites States Supreme Court on this issue. See, e.g. *Brown v. Vance*, 637 F.2d 272, 283 ("we need find no instance of actual judicial bias to hold the fee system constitutionally infirm)." The court wrote, "the test is whether a fee system presents a 'possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'" (*Id.* at p. 282, quoting *Tumey*, *supra*, 532 [47 S.Ct. 437, 444], and *Ward*, *supra*, 60 [93 S.Ct. 80, 83].)

Haas v. County of San Bernardino (2002) 27 Cal.4th 1017 (which Petitioner cited in his Appellate Court Reply Brief and in his Motion for Rehearing) summarized the governing principles as follows:

"Due process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest." (Emphasis added.) See also, *Goldberg v. Kelly*, *supra*, 397 U.S. 254, 267, 271 [90 S.Ct. 1011, 1020, 1022] (administrative hearings demand rudimentary due process, and an "impartial decision maker is essential.")

Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny. As the high court explained in *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] (*Tumey*), "[a]ll questions of judicial qualification may not involve constitutional validity . . . but it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

This high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case . . . 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" (*Aetna Life Ins. Co. v. Lavoie, et al., supra*, 475 U.S. at p. 825 [106 S.Ct. at p. 1587], quoting *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60 [93 S.Ct. 80, 83, 34 L.Ed.2d 267] (*Ward*), and *Tumey, supra*, 273 U.S. at p. 532 [47 S.Ct. at p. 444].) "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." (*Tumey, supra*, 273 U.S. at p. 532 [47 S.Ct. at p. 444].)

In *Withrow v. Larkin, supra*, 421 U.S. 35, 47 [95 S.Ct. 1456, 1464], the high court held that a claim of bias based on the combination of investigative and adjudicative functions in a state medical board had to "overcome a presumption of honesty and integrity in those serving as adjudicators . . ." But never, in the years since *Withrow*, has the high court so much as hinted that a litigant seeking to disqualify an adjudicator <u>for financial interest</u> must overcome

any such *presumption*. To the contrary, the high court has repeatedly and unambiguously held that courts do not, when faced with a claim of bias arising from financial interest, decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey*, *supra*, 273 U.S. 510, 532 [47 S.Ct. 437, 444], namely, whether the adjudicator's financial interest would offer a possible temptation to the average person as judge not to hold the balance nice, clear and true. (*Aetna*, *supra*, 475 U.S. at pp. 824-825 [106 S.Ct. at pp. 1586-1587]; *Connally v. Georgia* (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 444].) Indeed, applying this standard in *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 865, footnote 12 [108 S.Ct. 2194, 2205, 100 L.Ed.2d 855], the court went so far as to vacate a decision entered by a judge who was not conscious of the circumstances giving a university, on whose board of trustees he served, a financial interest in the case.

The rule declared in these civil and criminal cases also applies to administrative proceedings. In this context, the high court has written: "It is [Page 27 Cal.4th 1027] sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'" (*Gibson v. Berryhill*, *supra*, 411 U.S. 564, 579 [93 S.Ct. 1689, 1698.]

The adjudicator in the instant case not only ruled on admissibility of evidence, but also weighed the evidence, and made the ultimate decision regarding Appellant's fate. See *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1023-1025 (finding that the need for disqualification is greater when the adjudicator acts as fact finder in addition to ruling on legal matters.) The presiding officer who is at the *same time* the sole trier of fact must not only be impartial, but

must also not be subject to so much as a possibility or appearance of bias. *Haas, supra* at page 1030 (financial interest risks probability and appearance of bias in favor of the party who pays the arbitrator); see also, *Yaqub v. Valley Memorial Healthcare System*, 122 Cal.App.4th at 485, quoting *Haas, supra*: "The Court's inquiry . . . is not whether a particular man has succumbed to temptation, *but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge*." (Emphasis added.)

California Evidence Code section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she "has a financial interest in the subject matter in a proceeding or in a *party* to the proceeding." (Emphasis added.)

The U.S. Supreme court requires disqualification of an adjudicator where the financial interest is characterized as "direct, personal, substantial, [and] pecuniary," as distinguished from "slight." (*Aetna, supra*, 475 U.S. 813, 825-826 [106 S.Ct. 1580, 1587-1588], quoting *Ward, supra*, 409 U.S. 57, 60 [93 S.Ct. 80, 83], and *Tumey, supra*, 273 U.S. 510, 523 [47 S.Ct. 437, 441].)

Certainly, the Arbitrator's pay received from Respondents in the instant case cannot be dismissed as "slight" as the Hospital paid the Arbitrator's fee over the entire 32 hearing sessions, spanning two and one-half years. This type of compensation can only be characterized as "direct, personal, substantial, [and] pecuniary".

It is reasonable to presume that, with this type of compensation, the Arbitrator would be tempted to act on behalf of Kaiser's interests, despite the objective evidence placed before him at the hearings. It is also reasonable to presume that the Arbitrator would be further tempted to rule on behalf of Kaiser in this case to further his career specialty

of representing hospitals and medical staffs. (See Arbitrators' curricula vitae attached as exhibits Petitioner's Request for Judicial Notice. Appendix A-35 through Appendix A-46.)

Mechanisms to reduce the bias of adjudicators are not without precedent. For example, in *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, the California Supreme Court called for Kaiser to revise the mechanism it used to choose arbitrators for its medical malpractice cases.

B. The California Court Decisions in This Case are Internally Inconsistent and Conflict With Federal Law.

The decision upheld by the California Appellate Court, Second Appellate District, in this case, that the litigant must show "actual bias" and financial interest based on the "outcome" of the hearing in order to prevail on an allegation of pecuniary interest in violation of due process is not only in direct conflict with the above-cited cases but also directly conflicts with the California Appellate Court, Sixth Appellate District's recent holding in *Yaqub v. Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474,[1]. (Review denied by California Supreme Court, January 12, 2005).

The holding in *Yaqub* (Appendix A-47) on this matter is consistent with the U.S. Supreme Court's precedent in

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[1] *Yaqub* was published three days before Appellant's Reply Brief was due. Therefore Appellant was unable to cite *Yaqub* in his Appellate Reply Brief. However, Petitioner filed a Request under California Evidence Code § 451(a) for the Appellate Court to Take Judicial Notice of *Yaqub*, (citing *Haas*, supra) (Appendix A-21 through A-34). The Appellate Court denied Petitioner's request to take judicial notice of *Yaqub* and *Haas, supra*, with no reason stated. Petitioner, nevertheless cited *Yaqub* at the hearing and addressed *Yaqub*, and its citations to *Haas*, in Petitioner's Petition for Rehearing before the Appellate Court.

Tumey and *Ward*. *Yaqub* holds that no evidence of "actual prejudice" or of a direct financial interest in the "outcome" of the case is required for a showing of a financial interest in violation of due process. *Yaqub* states that the Court's inquiry is *not whether* a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man" as judge.'" *Yaqub* states:

> "We also acknowledge that there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case. As both the ARP and the trial court observed, 'the administrative record shows that the present hearing was conducted fairly and even-handedly by the presiding officer'. . . . The court further noted that in a previous {Slip Opn. Page 13} proceeding conducted by Justice Agliano the Hearing Panel had ruled in favor of the physician. Nevertheless, the Supreme Court emphasized in *Haas* that 'the risk of bias caused financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator.' *(Haas, supra,* 27 Cal.4th at p. 1030.) 'The Court's inquiry . . . is not whether a particular man has succumbed to *temptation*, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge.' (*Id.* at p. 1029.)"
>
> . . .
>
> "Code of Civil Procedure section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she 'has a financial interest in the subject matter in a proceeding or in a party to the proceeding.' And Canon 2 of the Code of Judicial Ethics states that a judge 'shall avoid impropriety and the appearance of impropriety in all of the judge's activities.' (Italics added.) The commentary to this canon provides an

> objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but 'whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.'" (See, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841. . . ." (Emphasis added.)

In addition to the issue of bias arising from the fact that the Hospital had paid the Abitrator's fee 100%, Petitioner's case holds another factor in common with *Yaqub* that compounds the situation of an adjudicator's financial interest - the fact that Respondent had chosen an Arbitrator whose career specialty was that of an attorney who serves as general counsel to hospitals and one who frequently serves as hearing officer or Arbitrator to hospitals and medical staffs. (See the Arbitrator's 1994 curriculum vitae at the time at issue and his curriculum vitae currently posted on the Internet (Appendix A-35 through A-46), both attached as exhibits to Petitioner's Request for the Appellate Court to Take Judicial Notice of *Yaqub*. (Appendix A-21 through A-34.) In *Yaqub*, in addition to the fact that Salinas Hospital had paid the hearing officer's fee 100 percent, the hearing officer in *Yaqub*, "had presided over a number of Fair Hearing proceedings at the hospital, resulting in 'significant financial gain' to him, which presented another likely source of bias in the hospital's favor."

Another factor in common with *Yaqub*, that Petitioner had argued before the superior court (Appendix B-14) and Appellate Court (Appendix A-71) was that at Petitioner's Appellate Review Board Hearing, Respondents had appointed their own attorney as legal advisor to the ARP, when Petitioner was *not* represented by counsel.

Likewise in *Yaqub,* Salinas Hospital had similarly appointed its own attorney as legal advisor to their ARP where the physician was not represented by counsel.

The *Yaqub* court (California Sixth Appellate District) held p. 486:

> "We do caution, however, that if an appellate review hearing does take place without counsel for either side, it would strain the bounds of due process to allow the hospital's attorney, who took an active role in assisting the MEC to bring charges against appellant, to serve as advisor to the board in the hearing. [City attorney's interactions with board on other occasions suggested probable influence and appearance of unfairness (citations omitted)." (Emphasis added.)

Petitioner further argued before the superior court (Appendix B-17) and appellate court (Appendix A-72), that Kaiser impermissibly denied him from making an effective ~~chal~~lenge to this bias during voir dire. (Appendix B-21 - ARP.Tr.12-15:19-3). Petitioner argued that the dual role held by Kaiser's counsel and Legal Adviser to the ARP violated California Business & Professions § 809.3(c) ("No peer review body shall be represented by an attorney if the licentiate is not so represented.") At the Appellate Review Board hearing, Petitioner objected to the fact that Respondents had appointed their own hospital's attorney as "legal advisor" to the panel and that all three members of the ARP panel were Kaiser appointed Kaiser affiliates:

> "DR. JAFFE: Everyone here today -- the panelists, Ms. Clark, Dr. Schottinger -- have a strong affiliation with Kaiser Hospital, Kaiser Foundation Hospital, and the Medical Group, and I take issue with having the attorney of staff and strong affiliates with the

medical group and the hospital as those who will stand to judge me. . . ." Arp.Tr.27:11-19) [2]

The Appellate Court's Opinion (Appendix A-15) that Petitioner must show evidence of "actual" bias on the part of the ARP under these circumstances is in direct conflict with the decision of the Appellate Court in *Yaqub*, where the *Yaqub* court found that *no* evidence of *actual* bias need be shown under these circumstances. The *Yaqub* court found it a violation of due process for the hospital to appoint its own attorney as legal advisor to the ARP when the physician was not so represented. The *Yaqub* court held that this situation "suggested probable influence and appearance of unfairness."

C. The U.S. Supreme Court Precedent that Adjudicators in Lawfully Mandated Adjudicative Hearings be Impartial Must be Safeguarded.

The Government's role is to protect its individual citizens through its laws. Yet, California courts have allowed medical entities to approach lawfully mandated peer review hearings without the required fairness and due process that apply to all other adjudicative hearings under the law.

When the adjudicator has a financial interest in the proceeding he cannot be impartial. This creates a bias that is repugnant to the Constitution of the United States and thus cannot be tolerated much less endorsed by court decisions.

An individual's career fate cannot be placed into the hands of an adjudicator who stands to profit financially by ruling against him.

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[2] Respondents had unfairly composed the ARP panel entirely with Kaiser appointed Kaiser affiliates when the Bylaws stated that only *one* member must be Kaiser affiliated (Appendix A-66).

Where there are conflicts in the opinions of the courts as to the right to impartial adjudicators, the rule of law demanding impartial adjudicators in administrative hearings must be safeguarded.

To protect against adjudication by financially interested parties, Petitioner respectfully requests the United States Supreme Court to grant Petitioner's Writ of Certiorari.

DATED: May 10, 2005

Respectfully submitted,

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Petitioner and Appellant, in Pro Se